BOARD OF APPEALS CASE NO. 116	*	BEFORE THE
APPLICANTS: Kenneth & Kirk Neubeck	*	ZONING HEARING EXAMINER
REQUEST: Rezone 1.03 acres from R2 (Urban Residential) to CI (Commercial Industrial) District	*	OF HARFORD COUNTY
HEARING DATE: September 18, 2006	*	

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ZONING HEARING EXAMINER'S DECISION

The Applicants, Kenneth Neubeck and Kirk Neubeck, are requesting the rezoning of 1.03 acres from the current R2/Urban Residential classification to a CI/Commercial Industrial classification. The subject parcel is located within the Third Election District at 1711Conowingo Road, Bel Air, Maryland 21014, and is more particularly identified on Tax Map 41, Grid Number 1A, Parcel 201.

The Applicants are alleging a mistake occurred during the 1997 Comprehensive Rezoning which would justify rezoning the subject parcel to a CI classification. They are also alleging a change in the character of the neighborhood since the 1997 Comprehensive Rezoning.

The Applicant, Mr. Kenneth Neubeck, one of the owners of the subject property, appeared and testified that the property is currently zoned R2. He stated that the Department of Planning and Zoning recommended rezoning to CI during the 2005 Comprehensive Rezoning, and the Council agreed with that recommendation. But for the County Executive's veto of the comprehensive rezoning legislation, the parcel would now be zoned CI.

Mr. Neubeck referenced the 2004 Zoning Map (*Applicants' Exhibit 1*) in identifying the location of the subject property and defining the neighborhood. He drew a circle around the subject property, and then drew a box approximately 1½ square miles around the subject property, representing what he defines as the neighborhood. The witness pointed out several properties within the defined neighborhood, including CI property at the northeast corner of MD Route 23 and U.S. Route 1, the village of Hickory to the North, and the Hickory Bypass to the east, the CI zoned Forest Hill Industrial Park to the northwest, and the B3 zoned area to the south of Route 23 which contains a Waffle House, Dairy Queen, 7-11 convenience store & gas station.

He indicated that all of these properties were already zoned business or industrial prior to the 1997 Comprehensive Rezoning, but had not yet been developed at that time. According to the witness, the entire neighborhood has changed since the last Comprehensive Rezoning, and it is now almost entirely developed for business and commercial use. He identified changes in the neighborhood as follows. The southeastern corner of MD Route 23 and U.S. Route 1 and the Hickory Road Bypass have now been developed. The CI parcel adjoining his southern property line formerly contained an abandoned church, but now contains a BMW dealership built just one year ago. (*See Applicant's Exhibit.10*). The GI, CI, & B3 zoned parcels to the north of his property, located at the northeast corner of the Hickory Road By-pass, have added numerous commercial uses such as a Burger King, sub shop, bank and restaurant. The GI area to the south of Route 23 has a continuous influx of new commercial buildings, including 6 to 7 which have been recently constructed. Although the zoning on the referenced parcels has not changed, they were not yet developed at the time of the last comprehensive rezoning. Now, over 100 new commercial buildings have been constructed on those parcels. The witness introduced several photographs of the area immediately surrounding his property to illustrate its commercial nature (*See Applicants' Exhibits 12C, 12D & 12G).*

In addition, Mr. Neubeck testified that the 9½ acre AG parcel adjoining his southeastern property line has recently been developed into a county owned sports complex containing multiple ball fields. The county acquired this property in 2001 (*See Applicant's Exhibit 3*), and installed an easement along his southern property line for use by the facility and the adjoining BMW dealership in 2002 *(See Applicant's Exhibit 4)*. A parking lot was constructed adjacent to the easement in 2004, also for use by both the sports facility and the BMW dealership. The parking lot, comes to within 15 feet of Applicants' property line, and was designed for 35 cars, but is regularly used by up to 70 vehicles. Mature trees which previously blocked some of the light from the sports complex were cut down to build the parking lot. As a result, the Applicant testified that his property is so brightly lit at night, that he can now mow his front lawn at 2:00 a.m. without turning on any lights. (*See photos designated as Applicant's Exhibits 12A, 12E, 12I & 12J*)

According to the witness, the front of his house is "almost in the end zone" (*See Applicant's Exhibits 1 & 12B*), and the noise emanating from the sports complex and the parking lot area is considerable. The Harford County Director of Recreation and Parks has informed him that the joint Harford County/Baltimore County football program housed at this facility is the largest in the state. On weekends he hears constant slamming doors, loudspeakers, non-stop traffic, and loud football games lasting up to 18 hours per day. People leave dogs in their cars which bark during the entire game. There are also loud tailgate parties continuing as late as 11:00 pm. The noise is so extreme that friends living ¼ to ½ mile away, in Bell Manor, can hear the games from their home. (*See Applicant's Exhibit 1*). The gate to the ball fields is rarely closed after games, resulting in the area also being used as a lovers lane with loud boom boxes playing late into the night. The witness has complained to County officials, who have informed him that they have no control over the fact that people do not abide by the no parking signs posted around the lot, or fail to close the gate. In addition, the witness testified that the BMW dealership utilizes the parking lot area for its trash dumpster and vehicle delivery trucks. Forklifts regularly unload vehicles from tractor trailers parked in the lot 15 feet from his property line. Dumpsters are located directly outside his front window, and emptying them is a very loud process. Trucks show up to empty them at all hours of the day and night, sometimes as late as 12:00 am. (*See Applicant's Exhibits 12K, 12L, 12M, 12O, & 12L*)

According to the witness, increased development within the area has also led to a significant increase traffic, including truck traffic on Jarrettsville Road heading toward Business Route 1, and traffic heading toward the Forest Hill Industrial Park. He testified that there are only two ways to get to the Forest Hill Industrial Park; one from Route 23 to Business 1, and the other from the west outside of the neighborhood. He stated that Business Route 1 and Route 23 are heavily used arterial highways, and the increase in traffic often causes him difficulty getting out of his driveway. Other changes testified to by the Applicant consist of the extension of city water and sewer to he premises when the BMW dealership was constructed within the past two years. In addition, the Applicants gifted a utility easement along their property line bounding Conowingo Road to the County in November of 2004. As a result, the presently vacant RO zoned parcel adjoining their northern property line can now acquire public sewer, and will likely be developed. (*See Applicant's Exhibit 6*)

Finally, the Applicant pointed out that the Department of Planning and Zoning Staff Report indicated that the property is zoned for high intensity, which it defined as 7.0 plus dwelling units per acre. He noted that the Department also stated in its Staff Report that the proposed rezoning conforms with the intent of the 2004 Master Plan due to the Land Use Plan showing the subject area as High Intensity.

The second witness to testify was the Co-Applicant Kirk Neubeck. The witness referred to the 2004 Landscape Plan for BMW of Bel Air (*Applicant's Exhibit 2*) and testified that he lives on the northern boundary of that tract. According to the witness, the easement and the parking lot shown on that plan were never anticipated by the county prior to the 1997 Comprehensive Rezoning.

Mr. Kirk Neubeck testified that he has "Monday Night Football" six nights per week and that after the games are over he has people in the parking lot tailgating. This continues for 16 hours per day on weekends. Kids throw balls onto his property, and he is unable to sleep due to all the noise. With regard to traffic, he testified that individuals and large vehicles such as Coke trucks, are constantly mistaking his driveway for the access drives to either the ball field or BMW. He is unable to get out of his own driveway due to all the traffic generated by the constant sporting events. He further testified that he has no neighbors to come in and testify on his behalf because he lives in a commercial industrial area. Finally, he opined that the ball fields are bringing his property values down.

The next witness to testify for the Applicants was Ms. Joan Ryder, who stated that she has been a real estate broker in Bel Air for 26 years. Ms. Ryder testified that the Applicant's property has decreased in value, and that the highest and best use for the subject property is not residential. She stated that the Applicants could not even resell their property under its present zoning classification because everything about the property which would cause concern to a potential buyer would have to be disclosed. Due to the surrounding uses, and problems with the ball field, no reasonable buyer would purchase the property for residential use.

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The final witness to testify for the Applicants was Mr. Greg Reed, who owns the R2 property on the other side of Conowingo Road to the east, and the two RO lots adjoining the subject parcel's northern boundary line. The witness testified that he has lived in Bel Air all his life, and that he grew up in Leeswood approximately 2 ½ miles east on MD Route 543 along the northern boundary of what the Applicant's described as the neighborhood. Mr. Reed stated that he supports the application because there has been a lot of change in the neighborhood since the 1997 Comprehensive Rezoning. The Hickory Road Bypass has now been built, and water and sewer extensions were extended to the entire area. In addition, there has been considerable commercial growth in the area, including construction of a Wawa, a grocery store, Hickory Village, and the Baltimore County Savings Bank. According to the witness, there has also been considerable residential growth in the area, which now needs commercial uses and land to serve it. He believes that this area is important because it can provide a location for commercial services in the vicinity, in a location with a road network to support them.

Mr. Anthony McClune, Deputy Director, Department of Planning and Zoning, appeared and testified on behalf of the Department regarding the findings of fact and recommendations made by that agency. He indicated that because the 2005 Comprehensive Rezoning was never actually enacted due to having been vetoed by the County Executive. Therefore, the question at hand is whether there was a mistake in the enactment of the 1997 Comprehensive Rezoning, or whether there has been a change in the character of the neighborhood since that date.

The Department defined the neighborhood more narrowly than the Applicant, stating that it comprises the area " bordered by the properties fronting along Business Route 1 to the west, the Route 1 Bypass to the southwest and Route 543 to the east" *(See Staff Report Attachment 4).* According to Mr. McClune, the neighborhood was identified by the Department as an area that would most directly impact the subject property with regard to changes. The Department utilized major road systems and properties fronting those systems to determine the neighborhood, and the witness stated that neighborhoods in general, should be identified by either natural features or road systems.

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With regard to the Applicant's allegation that there had been a change in the character of the neighborhood, Mr. McClune stated that the alleged changes must be unanticipated at the time of the comprehensive rezoning at issue. Therefore, development consistent with existing zoning patterns cannot be considered changes as long as it is in conformity with current zoning. He noted that the BMW property was zoned CI in 1997, and had in fact been zoned CI as far back as 1989. He also testified that there has been only one property rezoned in the area of the subject property since the 1997 Comprehensive Rezoning. That parcel, which consisted of only of 17,000 sq. ft. is located at the corner of Business Route 1 and Route 23. The property was formerly owned by the County, and had been zoned AG. It was rezoned to CI, in 2002 by the Board of Appeals in Case No: 115. That rezoning request was granted based on a mistake in the final alignment of Route 23.

With regard to the construction of the ball fields adjacent to Applicants' property, Mr. McClune stated that the Department's greatest concern is that a Parks and Recreation Development would be found to constitute a change in the character of the neighborhood. In fact, he indicated that in 2006, the County Council passed Bill 6-17, which now allows parks in all zoning districts. Construction of Tucker Field at its present location is, therefore, consistent with existing zoning and does not rise to the level of substantial change in the character of the neighborhood.

Also with regard to the ballpark, Mr. McClune testified that while it was developed after 1997, there was actually a memorandum of understanding between the SHA and the county regarding the use of that property for a Harford County Parks Facility as early as 1996. (*See memorandum dated December 23, 1997 and letter dated October 1, 1996 regarding proposed relocation of Tucker Field*). He did state that there was no specific discussion of the proposal at that time other than the concept of moving Tucker Field, from its location to the southwest of the current fields. The witness acknowledged that the Old Tucker Field contained only one football field and was constructed on a much smaller parcel. However, he stated that that use is located within a permitted zone, and there are many larger fields within the county.

Mr. McClune did not know how many other Parks and Recreation facilities are lit, or how many parking spaces are required at a facility such as Tucker Field. He did indicate that this is not a unique ball field based upon the number of hours which it is used, and stated that in his opinion, the nature and extent of use of a parks and recreational field is irrelevant to the question of comprehensive rezoning. When cross-examined about Cedar Field the witness indicated that there are also residential homes adjacent to that facility. He admitted that Cedar Field will cause impact to that neighborhood, but stated that the legislature has determined that impacts caused by ball fields in recreational areas are acceptable.

With regard to the Applicant's argument that increased traffic amounts to a change in circumstances, the witness testified that the increase has been well within what was anticipated at the time of the 1997 Comprehensive rezoning. Both Route 23 and Route 1 are arterial roads designed to carry their current traffic volume. With regard to water and sewer, the witness acknowledged that it is being constructed in the area, but stated that the property is located within the development envelope, which was previously slated to receive these services.

The witness further testified that in his opinion, the Applicants had not brought forth any evidence of a mistake in the classification of the property during the 1997 Comprehensive Rezoning process, or of any evidence that was not considered by the Board during that process. He stated that while the Department recognizes that development has occurred in the area of the subject property since the 1997 comprehensive rezoning, that development is consistent with the Land Use Plan. In addition, although that development has resulted in impact to the subject property, as does any use, those impacts are not sufficient to warrant piecemeal rezoning. He verified that the Council voted to change the zoning of the subject parcel to CI during the 2005 Comprehensive Rezoning, and stated that he agrees the proposed change was consistent with both the Land Use Plan and the 2004 Master Plan. However, he indicated that the standard for piecemeal rezoning is totally different than the one applicable to comprehensive rezoning. He also stated that in addition to single family homes, churches and fire stations are permitted uses in the R2 District, and, assembly halls and daycare centers are permitted as special exception uses.

Finally, Mr. McClune indicated that although the subject property is not in a historic district the Historic Preservation Commission had recommended denial of the application due to an unspecified potential impact on two adjacent historic sites. He also testified that the Planning Advisory Board had voted 4-0 to recommend denial of the subject application (*Staff Report Attachment 17*)

No witnesses appeared in opposition to the requested zoning reclassification.

CONCLUSION:

The Applicants are requesting a rezoning of the subject property from R2, the classification assigned during the 1997 Comprehensive Rezoning, to CI/Commercial Industrial. The basis of their request is that there has been a substantial change in the character of the neighborhood since the last comprehensive rezoning and that a mistake occurred during the 1997 comprehensive rezoning process.

The Zoning History of the Subject Parcel Is as Follows:

1957 Comprehensive Zoning Review: The property was zoned R2 Urban Residential District (*SR Attachment 13*)

1982 Comprehensive Zoning Review: There was little change in the area and the property remained R2 Urban Residential District. (*SR Attachment 13*)

1989 Comprehensive Zoning Review: The property remained R2 Urban Residential District. (*SR Attachment 14*)

1997 Comprehensive Zoning Review: There was no request to change the zoning, and the property remained R2 Urban Residential District.

2005 Comprehensive Zoning Review: The Applicants requested the zoning be changed to CI/Commercial Industrial. The County Council voted to change the zoning to CI, however the County Executive vetoed the Legislation and the County Council did not override the veto. Therefore the zoning assigned to the property during the 1997 Comprehensive Rezoning remains in effect.

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Applicable Code Sections:

Section 267-12 A. Zoning Reclassifications:

" A. Application initiated by property owner.

(1) Any application for a zoning reclassification by a property owner shall be submitted to the Zoning Administrator and shall include:

(a) The location and size of the property.

(b) A title reference or a description by metes and bounds, courses and distance.

(c) The present zoning classification and the classification proposed by the applicant.

(d) The names and addresses of all persons, organizations, corporations or groups owning and, any part of which lies within five hundred (500) feet of the property proposed to be reclassified as shown on the current assessment records of the State Department of Assessments and Taxation.

(e) A statement of the grounds for the application, including:

[1] A statement as to whether there is an allegation of mistake as to the existing zoning and, if so, the nature of the mistake and facts relied upon to support this allegation.

[2] A statement as to whether there is an allegation of substantial change in the character of the neighborhood and, if so, a precise description of such alleged substantial change.

(f) A statement as to whether, in the applicant's opinion, the proposed classification is in conformance with the Master Plan and the reasons for the opinion."

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In support of their opinion that the proposed rezoning is in conformance with the Master Plan, the Applicants indicated that both the Department of Planning and Zoning and the Council recommended CI zoning for the property during the 2005 Comprehensive Rezoning. But for the County Executive's veto the comprehensive zoning legislation, the property would now be zoned CI. In addition the Staff Report indicated that the property is zoned for high intensity, which it defines as 7.0 plus dwelling units per acre. They noted that the Department also indicated in the Staff Report that the proposed rezoning conforms with the intent of the 2004 Master Plan due to the Land Use Plan showing the subject area as High Intensity. These statements are verified in the Department of Planning and Zoning Staff Report and are undisputed.

Change in the Character of the Neighborhood:

There is a "strong presumption of correctness of original zoning and of comprehensive rezoning. To sustain a piecemeal change in circumstances... *strong* evidence of mistake in the original zoning or comprehensive rezoning or evidence of substantial change in the character of the neighborhood must be produced (citing cases). ... ." *Stratakis v. Beauchamp,* 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973). See also *Quinn v. County Comm'rs of Kent County, 20 Md. App. 413, 316 A.2d 535 (1974).*

> "In order to establish a change in the character of the neighborhood a person seeking a zoning reclassification under this rule must present evidence demonstrating at least the following:
>
> (a) What area reasonably constituted the "neighborhood" of the subject property.
>
> (b) The changes which have occurred in that neighborhood since the original or last comprehensive zoning affecting the property.
>
> (c) That these changes resulted in a change in the character of the neighborhood which would justify reclassification to the category requested.'

Montgomery v. Board of County Comm'rs for Prince George's County, 256 Md. 597, 261 A.2d 447 (1970). *See also*, *Mayor & Council of Rockville v. Henley,* 268 Md. 469, 302 A.2d 45 (1973)*; Heller, supra, at v. Prince George's County,* 264 Md. 410, 286 A.2d 772 (1972) and; *Clayman v. Prince George's County,* 266 Md. 409, 292 A.2d 689 (1972).

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In defining what he represented as the neighborhood of the subject property, Mr. Kenneth Neubeck drew a circle around his property on a zoning map, and then drew a box approximately 1½ square miles around that parcel. He described several properties located within his proposed neighborhood, but offered no explanation as to how he arrived at a determination of its boundaries. Although the concept of a neighborhood is flexible, and varies on a case by case basis, the boundaries established must be shown to comprise an area reasonably within the "immediate environs" of the subject property and be of such a nature as to have affected its character." *See, e.g., Jay v. Smith, 34 Md. App.* 538, 368 A.2d 487 (1977)*; Clayman v. Prince George's County,* 266 Md. 409, 292 A.2d 689 (1972)*; Montgomery v. Board of County Comm'rs for Prince George's County,* 263 Md. 1,280 A.2d 901 (1971). The Applicants' proposed neighborhood encompasses parcels a considerable distance away from the subject property, including some with intervening residential neighborhoods with no proven relationship to the subject property. In addition, the Applicants failed to provide a rational basis for the boundary lines of their proposed neighborhood. The Hearing Examiner therefore finds that the Applicants' neighborhood did not accurately reflect the immediate environs of the subject property.

The Department of Planning and Zoning on the other hand defined the neighborhood as the area bordered by the properties fronting along Business Route 1 to the west, the Route 1 Bypass to the southwest and Route 543 to the east. The Department utilized major road systems and properties fronting those systems to determine the neighborhood boundaries. "Just as streets highways or other substantial physical barriers may be recognized as a dividing line between zones of different classifications, they may just as well form the geographic confines of a neighborhood for the purpose of rezoning." *Brown v. Wimpress,* 250 Md. 200, 242 A.2d 157 (1968); *See also, Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48,151 A.2d 144 (1959). The Hearing Examiner agrees with the Department of Planning and Zoning that the neighborhood is logically defined by the road system in this case.

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The Applicants made five arguments supporting their allegation of a change in the character of the neighborhood since the 1997 Comprehensive Rezoning; 1) The Hickory Road Bypass has now been developed; 2) the neighborhood is now almost entirely developed for business and commercial use; 3) sewer and water has now been extended to the subject property and surrounding area; 4) increased development within the area has led to a significant increase traffic; and 5) the 9 ½ acre AG parcel adjoining their southeastern property line has recently been developed into a county owned sports complex. The individual merits of each alleged change will be addressed within the confines of the analysis of that specific allegation. The potential cumulative effect of these changes will be discussed thereafter.

With regard to the first four alleged changes, it is important to note that each of them contemplated by the Board prior to the enactment of the 1997 Comprehensive Rezoning. The only change alleged not to have been previously contemplated by the Board involved the development of Tucker Field and its accessory uses. The Maryland Court of Appeals has frequently recognized that development of an area along the lines contemplated in the original comprehensive zoning is not such a change as would support a finding of a substantial change in the character of the neighborhood. *Prince George's County Council v. Prestwick, Inc.,* 263 Md. 217,282 A.2d 491 (1971). Changes contemplated prior to the latest comprehensive zoning are usually not relevant in determining whether a substantial change has occurred to support rezoning of property. Changes in the character of the neighborhood prior to the adoption of the comprehensive zoning may be considered only in conjunction with subsequent changes. *Buckel v. Board of County Comm'rs of Frederick County,* 80 Md. App. 305, 562 A.2d 1297 (1989)

With regard to the Applicants' first alleged change, it is undisputed that the Hickory Road Bypass has now been completed. That project was already well into the planning stages at the time of the last comprehensive rezoning. Contemplated road improvements do not change the character of a neighborhood. *Clayman v. Prince George's County*, 266 Md. 409, 292 A.2d 689 (1972). Relocation and improvement of *highways,* where such were contemplated on a zoning or master plan, are not to be considered as changes since these changes had already been contemplated. *Howard Research & Dev. Corp. v. Zoning Bd. of Howard County,* 263 Md. 380, 283 A.2d 150 (1971).

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In *Dustin v. Mayor & Council of Rockville*, 23 Md. App. 389, 328 A.2d 748 (1974), the court held that the existence of *new roads or road changes* is a factor to be taken into consideration, but without some other change in the community or neighborhood, rezoning cannot be justified. Rezoning was denied in that case because the heterogeneous (part residential and part industrial) character of the neighborhood remained unchanged by road changes since neighborhood development had proceeded as planned within the original zoning.

The second alleged change referred primarily to recent commercial development, although both the Applicants and one of their own witnesses pointed out that there has also been considerable residential development in the area of the subject property. The Applicants noted the CI parcel adjoining their southern property line, which now contains a recently constructed BMW dealership, but, stated that property was zoned CI as far back as 1989. They also referenced GI, CI, & B3 zoned parcels located at the northeast corner of the Hickory Road Bypass which have added numerous commercial uses. In addition, they pointed out that the Forest Hill Industrial Park located approximately 1½ miles away, on the opposite side of an intervening residential neighborhood, has grown considerably. However, most of these parcels are outside the reasonable environs of the subject neighborhood.

In most reported cases where piecemeal rezoning has been is permitted, there have been one or more prior rezonings of nearby properties. For example, three existing commercial uses within 150 to 750 feet and rezoned but undeveloped commercial lots within one-half mile of the subject property has been held to amount to a substantial change in the character of the neighborhood. *Birckhead v. Board of County Comm'rs for Prince George's County,* 260 Md. 594, 273 A.2d 133 (1971). And, reclassification from residential to commercial was held justified where changes included commercial rezonings within 2,000 to 3,000 feet of property and commercial construction was completed on land abutting and across the road from the property. *Himmelheber v. Charnock,* 258 Md. 636, 267 A.2d 179 (1970).

Nonetheless, in the following cases, even reclassifications of nearby properties were held insufficient to affect the character of the neighborhood. *Woodlawn Area Citizens Ass'n v. Board of County Comm'rs of Prince George's County,* 241 Md. 187, 216 A.2d 149 (1966) *(*Eight reclassifications on the opposite side of a highway ranging from 3,300 to 7,200 feet from property) and *DePaul v. Board of County Comm'rs for Prince George's County,* 237 Md. 221, 205 A.2d 805 (1965) *(*Reclassifications occurring one-half mile or more from the subject property). And, in *Goucher College v. DeWolfe*, 251 Md. 638, 644, 248 A.2d 379, 383 (1968)although the applicants cited 45 changes within a one mile radius, and 81 changes within a 1 ½ mile radius, the Court of Appeals found them too remote to come within the confines of the neighborhood.

In the present case, the Applicants did not claim that even one of the newly developed commercial or business parcels had been rezoned since the 1997 Comprehensive Rezoning. Rather, they expressly indicated that all of those were already zoned for business or commercial use prior to that date. In fact, only one rezoning has occurred in the area of the subject property since 1997. That parcel, consisted of a 17,000 sq. ft. section of AG zoned land surrounded by a large CI zoned parcel, located at the corner of Business Route 1 and Route 23. The property, which was formerly owned by the County, was rezoned CI in 2002 by Board of Appeals in Case No: 115. That rezoning request was granted based on a mistake in comprehensive plan occasioned by prior uncertainty regarding the final alignment of Route 23.

The vicinity around the Applicants' neighborhood may have become more commercial as additional development takes place. However, all of the development cited by the Applicants was contemplated prior to the time of the last comprehensive rezoning. In addition, all of that development consistent with pre-existing zoning patterns and is taking place in conformity with current zoning.

Applicants' third alleged change in the character of the neighborhood is the extension of city water and sewer to the premises within the past year, during the construction of a new BMW dealership adjoining their property to the south. Additionally, the Applicants themselves gifted a utility easement along their property line with Route 1 to the County in November of 2004. As a result, the presently vacant RO zoned parcel adjoining their northern property line can now acquire public sewer, and according to the Applicants will likely be developed. It is undisputed that water and sewer is now being constructed in the area of the subject property.

However, the property is located within the Development Envelope, which has long been slated to receive these services. The availability of public sewer and water services since the last comprehensive zoning was adopted does not result in a change in the character of a neighborhood because these services are equally as important to residential as to commercial development. *Clayman v. Prince George's County*, 266 Md. 409, 292 A.2d 689 (1972); *See also, Howard Research & Dev. Corp. v. Zoning Bd. of Howard County*, 263 Md. 380, 283 A.2d 150 (1971). This is attested by the Applicant's own testimony that there has been both residential and commercial development in the area of the subject property since the last comprehensive rezoning.

With regard to the potential development of the adjoining RO parcels to their north now that sewer is available, a zoning board is entitled to consider projects that are reasonably probable of fruition in the foreseeable future to demonstrate a change in the character of a neighborhood. *Jobar Corp. v. Rodgers Forge Community Ass'n, Inc*., 236 Md. 106, 202 A.2d 612 (1964) However, as with the other commercially zoned parcels in the area, this development was obviously contemplated prior to the 1997 comprehensive rezoning as evidenced by the parcels' RO zoning classification.

Fourthly, the Applicants allege that increased development within the area has led to a significant increase in traffic, including truck traffic on Jarrettsville Road heading toward Business Route 1. There has also been an increase in traffic heading toward the Forest Hill Industrial Park. According to the undisputed testimony of Mr. Kenneth Neubeck, there are only two ways to get to that Industrial Park; one way is from Route 23 to Business 1, and the other is from the west, outside of the neighborhood. He testified that because both Business Route 1 and Route 23 are heavily traveled arterial highways the increased traffic often causes him difficulty getting out of his driveway. However, Mr. McClune's undisputed testimony indicates that this increase in traffic is well within what was anticipated during the 1997 Comprehensive Rezoning, and both Route 23 and Route 1 are arterial roads designed to carry their current traffic volume.

The presence of increased traffic on neighborhood roadways is not significant evidence of change in the character of a neighborhood. *Heller v. Prince George's County, 264 Md.* 410, 286 A.2d 772 (1972). *See also, Clayman v. Prince George's County,* 266 Md. 409, 292 A.2d 689 (1972)*; Hardesty v. Dunphy,* 259 Md. 718, 271 A.2d 152 (1970).

In addition, the Maryland Court of Appeals has held that "[s]imply because a piece of ground must be reached by driving through another zoning classification is certainly not sufficient reason to reclassify the land-locked parcel to the same classification as the property that has been used to gain entrance"' *Greenblatt v. Toney Schloss Properties Corp.,* 235 Md. 9, 13, 200 A.2d 70, 72 (1964).

The Applicants' most outspoken allegations of change center around the development of a county owned sports complex containing multiple ball fields on the 9½ acre parcel adjoining their southeastern property line. Undisputed testimony has shown that the county relocated Tucker Field to an AG zoned parcel adjacent to the Applicants property after the 1997 Comprehensive Rezoning. Thereafter, in 2001, the County acquired an easement in property bordering the Applicants' southern property line from the adjacent BMW dealership in exchange for the transfer of another parcel at the corner of Routes 1 and 23. In 2002, the County installed an access drive on that easement for use by both Tucker Field and the commercially zoned BMW dealership. Subsequently, in 2004, the County constructed a parking lot adjacent to the easement for use by both the Tucker Field facility and the BMW dealership.

The parking lot, which comes within 15 feet of Applicants' property line, was designed for 35 cars, but is regularly used by up to 70 vehicles per day. Mature trees which previously buffered the Applicants property, and blocked some of the light from the sports facility were cut down to build the parking lot. As a result, the Applicant testified that his property is now so brightly lit up at night, that he can mow his front lawn at 2:00 am. without turning on any lights. This fact is clearly verified by the photographs submitted as Applicant's Exhibits 12A, 12E, 12I & 12J. It is also clear that the construction of this facility has had an adverse impact on the Applicants' use and enjoyment of their property for single family residential purposes. The noise emanating from the sports complex, particularly the parking lot area is considerable. In addition, the BMW dealership utilizes the access drive and parking lot for trash dumpster placement and vehicle delivery. Forklifts regularly unload vehicles from tractor trailers parked in the lot 15 feet from Applicants property line. The dealership's dumpsters are located directly outside his front window loud trucks show up to empty them at all hours of the day and night.

Mr. McClune, however, presented undisputed testimony that recreational parks are permitted in the AG District, that Tucker Field is not a unique ball field based upon the number of hours which it is used, and that there are larger ball fields located within the county, including Cedar Field which is also located in a permitted zone, adjacent to residential homes. Mr. McClune also offered his undisputed opinion that although Cedar Field will cause impact to the neighborhood which it adjoins, the legislature has determined that impacts caused by ball fields are acceptable in residential areas

"'It is well recognized that the location in a residential zone of improvements of a character permitted by the ordinance, even although not necessarily compatible with a residential development, is not the type of change of character of a neighborhood which will justify reclassification." *France v. Shapiro,* 248 Md. 335, 343, 236 A.2d 726, 730-31 (1968) (*alleged changes included development of a synagogue, school and apartment complex*.) For other permitted uses falling into the same category, see *Howard Research & Dev. Corp. v. Zoning Bd. of Howard County,* 263 Md. 380, 283 A.2d 150 (1971) (*public park*); *Heller v. Segner,* 260 Md. 393, 272 A.2d 374 (1971) (storage tank); *Agneslane, Inc. v. Lucas,* 247 Md. 612, 233 A.2d 757 (1967) (*firehouse*); *Baker v. Montgomery County Council,* 241 Md. 178, 215 A.2d 831 (1966) (*school)*; *Levy v. Seven Slade, Inc., 234 Md. 145, 198 A.2d 267 (1964)* (*synagogue, school, parking lot, powerhouse*); *Kaslow v. Mayor & Council of Rockville,* 236 Md. 159, 202 A.2d 638 (1964) (*church*); *Montgomery County v. Ertter,* 233 Md. 414, 197 A.2d 135 (1964) (*armory, vehicle shed, paved area*).

Although, based on the individual analysis above none of the Applicants alleged changes, standing alone, constitute a change in the character of the neighborhood sufficient to warrant piecemeal rezoning the question remains as to whether the cumulative effects of those alleged changes are sufficient to do so. The Court of Special Appeals stated in *The Bowman Group v. Dawson Moser,* that "[c]hanges in the character of the neighborhood, which included previous rezonings, road upgrades and new water and sewer lines, should be evaluated as cumulative changes in determining whether the aggregate changes in character of the neighborhood since the last zoning were such as to make the question fairly debatable. ... The [Board] in considering the issue of substantial change, must consider all changes cited and pertinent facts in concert, and take their totality to determine whether there is support for the proposition that there has been a substantial change." *The Bowman Group v. Dawson Moser,* 112 Md. App. 694,686 A.2d 643 (1996)

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Most cases which have considered multiple allegations of change in the character of the neighborhood address issues of rezonings in the area of the subject property. However, there were no rezonings alleged by the Applicants in the present case. In addition, as previously stated, four out of the five changes alleged by the Applicants were actually proven to have been contemplated and anticipated prior to the enactment of the 1997 Comprehensive Rezoning. The Court of Appeals has held that commercial and residential development which appear to have been contemplated in the original zoning plan, together with improvement in water and sewerage facilities contemplated at the time of the adoption of the plan, standing alone may not be taken as a change of conditions affecting the neighborhood. *Helfrich v. Mongelli,* 248 Md. 498, 237 A.2d 454 (1968) *or Chatham Corp. v. Beltram,* 252 Md. 578,251 A.2d 1 (1969).

In *Grove Triangle, Inc. v. Mayor & City Council of Laurel, 262 Md. 677, 278 A.2d 555 (1971)* the Court of Appeals determined that the widening of the major highway in front of the subject property and its immediate location near new U.S. Route I-95, and existing commercial activities directly across the street, including a service station and a 7-11 store were insufficient to sustain a finding of change in the character of the neighborhood from residential to commercial. *Heller v. Prince George's County*, 264 Md. 410, 286 A.2d 772 (1972) found evidence that the property abutted a heavily traveled highway, adjoined a proposed church site, and was in close proximity to a special exception use and two commercial-industrial nonconforming uses, insufficient to justify reclassification from rural residential to light industrial.

In *Clayman v. Prince George's County*, 266 Md. 409, 292 A.2d 689 (1972) the extension of sewer and water facilities, completion of previously contemplated road improvements, increased traffic, subdivision growth and urbanization were held to be insufficient evidence of change in the character of the neighborhood to justify reclassification from a residential zone to a commercial zone as the changes cited reflect the fruition of zoning established for the area under the last comprehensive zoning. The Hearing Examiner finds that case persuasive, because it encompasses four out of the five allegations of change raised by the Applicants in the present case. The only remaining change alleged in this case is construction of a non commercial permitted use on AG property, next to residentially zoned property.

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The Hearing Examiner finds that the evidence presented in this case was insufficient to overcome the onerous burden of proving substantial change in the character of the neighborhood sufficient to warrant piecemeal rezoning. First, the Applicants failed to reasonably establish or define the neighborhood of the subject property. Second four of the five alleged changes were contemplated and anticipated by the Council prior to the enactment of the 1997 Comprehensive Rezoning. There have been no rezonings of a similar nature in the area of the subject property since the last comprehensive rezoning. Rather, development has taken place in conformity with current zoning, consistent with pre-existing zoning patterns. The subject property is located within the Development Envelope, which has long been slated to receive public sewer and water. Increased traffic naturally follows increased development. However, the alleged increase in traffic is well within what was anticipated during the 1997 Comprehensive Rezoning, and both Route 23 and Route 1 are arterial roads designed to carry their current traffic volume. All of these alleged changes in the character of the neighborhood occurred prior to the adoption of the 1997 Comprehensive Zoning and should therefore be considered only in conjunction with subsequent changes.

The only subsequent change alleged is the addition of Tucker Field and its accessory uses. The Hearing Examiner finds that the development Tucker Field, has resulted in adverse impact to the subject property. However, the Hearing Examiner also finds that even in conjunction with other previously contemplated development this fact is insufficient to warrant rezoning. A long line of previously cited cases have determined that location of permitted uses in a residential zone, including a public park, even if not necessarily compatible with residential development, is not the type of change in the character of a neighborhood which will justify reclassification.

Recreational parks are permitted in the AG District, Tucker Field is not a unique ball field, and there are larger ball fields located within the county, adjacent to residential neighborhoods. Although Tucker Field admittedly causes adverse impact to Applicant's property, the legislature has determined that such impacts are acceptable in residential areas. In addition, proof of adverse impact to one adjacent property does not necessarily amount to a change in the character of the entire neighborhood, and the Applicants failed to show that any other properties in the area were adversely impacted by the construction of Tucker Field. "There is a marked difference between the changes which will justify a reclassification ... and those which impel one."*Board of County Comm'rs for Prince George's County v. Meltzer,* 239 Md. 144, 155, 210 A.2d 505, 511 (1965)

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Mistake as to the Existing Zoning:

The original Application did not allege a mistake in the 1997 comprehensive rezoning with regard to the subject property. On July 24, 2006, the Applicants submitted a written letter to the Department of Planning and Zoning requesting that mistake in the existing zoning be added as a ground for their application. No statement of facts relied on in support of that allegation was included with that letter. The only evidence of mistake introduced by the Applicants at the hearing was Mr. Kirk Neubeck's testimony that the easement and the parking lot shown on Applicants' Exhibit 2 were never anticipated by the County prior to the 1997 Comprehensive Rezoning.

The Maryland Court of Special Appeals addressed the strong presumption of correctness of comprehensive rezoning and the evidence necessary to overturn that presumption on the ground of mistake in the case of *Boyce v. Sembly,* 25 Md. App. 43, 334 A.2d 137 (1975) stating:

> "... A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. (Cases cited.) Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect." *25 Md. App. at 50-51, 334 A.2d at 142-43.*
>
> Boyce continued ...
>
> "It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council. This evidentiary burden can be accomplished by showing that specific physical facts were not readily visible or discernible at the time of the comprehensive zoning, *Bonnie View Club, supra,* at *242 Md. 48-49, 52* ... (mineshaft and subsurface rock formation); by adducing testimony on the part of those preparing the plan that then existing facts were not taken into account, *Overton, supra,* at *225 Md. 216-17* ... (topography); or by producing evidence that the Council failed to make any provision to accommodate a project, trend or need which it, itself, recognized as existing at the time of the comprehensive zoning, *Jobar Corp., supra,* at 236 Md. 116-17 ... (need for apartments)." *See Rohde, supra, at* 234 Md. 267-68, 199 A.2d 221.

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> "Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not 'fairly debatable.' " *25 Md. App. at 51-52, 334 A.2d at 143.*

Although the Department acknowledges that the existing Tucker Field was developed after the 1997 Comprehensive Rezoning, Mr. McClune presented undisputed testimony that there was actually a memorandum of understanding between the SHA and the County regarding the use of that property as a Harford County Parks Facility as early as 1996. He gave the Hearing Examiner copies of a memorandum dated December 23, 1997 and letter dated October 1, 1996 regarding proposed relocation of Tucker Field which had not been included in the Staff Report. However, Mr. McClune offered additional undisputed testimony that there were no specific discussions regarding that proposal prior to the comprehensive rezoning, other than the general concept of moving Tucker Field from its existing location to its present location adjacent to Applicant's property. He also acknowledged that the former Tucker Field contained only one football field and was constructed on a much smaller parcel.

Mr. McClune also directed the Hearing Examiner to Board of Appeals Case No: 115 wherein it was determined that a mistake was made in the 1997 comprehensive rezoning classification of a small portion of the property onto which Tucker Field was eventually moved. The Hearing Examiner in that case found, based on undisputed testimony, that the County could not possibly have known the anticipated use of the ball field property prior to the 1997 comprehensive rezoning. The Hearing Examiner in the present case therefore finds, based on Mr. McClune's undisputed testimony, and the decision in Board of Appeals Case No: 115, that although there may have been a general conceptual agreement to relocate Tucker Field prior to the 1997 Comprehensive Rezoning the county did not know the actual anticipated use of the current ball field property at the time of the last comprehensive rezoning.

Even if the County had actually anticipated the eventual *use* of the property, there was absolutely no evidence presented to contradict Applicants' allegation that the easement to and parking lot for Tucker Field and BMW, as shown on Applicants' Exhibit 2, were unanticipated by the County prior to the 1997 Comprehensive Rezoning. The only reference to either an access drive or a parking lot in the December 23, 1997 memorandum or the October 1, 1996 letter was a statement that if the County constructs the field prior to completion of the Hickory Bypass, it will also construct a gravel parking lot and access to the site *from MD Route 23* at its expense. Conversely, if the replacement field was completed in coordination with the Hickory Bypass the SHA was to pay for the project. In either event, the documents contain a notation that the "parking lot will serve a joint purpose: (1) parking for the recreation filed; and (2) as a park and ride lot for area commuters." It is impossible for the County to have been referencing the existing access drive because that drive provides access to Tucker Field from Route 1, not from Route 23.

The property onto which Tucker Field was eventually relocated was not actually deeded to the County by the SHA until December of 1999. Thereafter, in September of 2002, the county conveyed the 17,000 sq ft parcel which was the subject of Board of Appeals Case No. 115 to the owner of the BMW dealership. (*See Applicants Exhibit 4*) In exchange, the County acquired an Easement from BMW in July of 2004, on which to construct the existing access drive and parking lot for the relocated Tucker Field. (*See Applicants Exhibit 9).* That Easement provided for use of the access drive and parking lot by both the County and BMW.

The Hearing Examiner, therefore, finds, based on the evidence presented, that the County had no knowledge of the subsequently constructed access drive and parking lot at the time of 1997 Comprehensive Rezoning, and that this fact was not considered by the Board at that time. The Applicants have therefore proven a mistake in the 1997 Comprehensive Rezoning by showing that there were specific facts which that were not considered by the Board during that process.

"[T]he existence of a mistake by the zoning authority at the time of the original zoning permits the legislative body to grant the reclassification, but does not require it to do so." *Chesapeake Ranch Club v. Fulcher*, 48 Md. App. 223, 228, 426 A.2d 428,431 (1981). Once the petitioner has established a zoning mistake, a zoning change is permitted but, not required. A rezoning on the basis of mistake is only compelled if existing zoning is confiscatory.

Consequently, two issues must be resolved in rezoning on the basis of mistake: (1) was there a prior zoning mistake? and (2) if so, is rezoning warranted? As explained by the Court of Special Appeals in *White v. Spring* "In rezoning matters under the change/mistake rule, once a mistake is established, the council is in the same position as it was in at the time of the prior comprehensive rezoning, i.e., before the strong presumption of validity had been created... At that point, after a prior mistake has been established that entity has the same power to rezone that it had at the time of the comprehensive rezoning... . " *White v. Spring*, 109 Md. App. 692, 675 A.2d 1023 (1996)

It is clear that the construction of Tucker Field and the access drive and parking lot used by both the park and the adjacent BMW dealership has had adverse impacts on the Applicants' enjoyment of their property for single family residential purposes. The Applicants are regularly subjected to excessive noise, bright lights, blowing trash and trespassing people and dogs. However, the question at hand is whether advance knowledge of these impending developments, and their likely impacts would have prompted the Council to reclassify the Applicants' property from R2 to CI during the 1997 Comprehensive Rezoning.

The actual ball fields at Tucker Field were built on AG zoned property, but the access drive and parking lot were constructed on CI zoned property. No evidence was presented as to whether parks were permitted in the CI District in 1997. However, Mr. McClune's undisputed testimony established that in 2006 the County Council passed Bill 6-17, which now allows parks in all zoning districts as a matter of right. This evidences the County's strong interest in establishing and maintaining parks and recreational facilities. That function is a valid exercise of its police power. Ball fields are also permitted adjacent to residential neighborhoods. Tucker Field is not a unique ball field, and there are larger ball fields located within the county.

Although Tucker Field admittedly causes adverse impact to Applicant's property, the legislature has apparently determined that such impacts are acceptable in residential areas. In addition, the Council was aware of the CI classification of the adjoining parcel on which the BMW dealership was eventually built prior to 1997. In fact, that property had been zoned CI as far back as 1989. It was, therefore, apparent that this property would eventually be developed for commercial use.

Nevertheless, they failed to change the Applicants' R2 zoning classification during the 1997 Comprehensive Rezoning. Therefore, the Hearing Examiner finds it unlikely that the Council would have changed the zoning classification of Applicant's property solely as a result of the impending development of Tucker Field adjacent to their property, absent a finding that the failure to do so would amount to a confiscatory taking.

" [T]he finding of mistake merely permits the grant of requested zoning, but does not compel or require rezoning as a matter of law unless the existing zoning classification unconstitutionally deprives the owner of any reasonable use of the property. *Anne Arundel County v. A-Pac Limited*, 67 Md. App. 102, 506 A.2d 671 (1986). The Applicants attempted to present evidence of confiscatory zoning classification by introducing the testimony of Ms. Joan Ryder. Ms. Ryder stated that she has been a real estate broker in Bel Air for 26 years, however, she was neither qualified, offered, nor admitted as an expert witness. She testified that the Applicant's property has decreased in value, and that the highest and best use for the subject property is not residential. She also indicated that the Applicants could not resell their property under its present zoning classification because all issues of concern would have to be disclosed to potential buyers, and due to the surrounding uses, and problems with the ball field, no reasonable buyer would purchase the property for residential use. Ms. Ryder's testimony consisted primarily of conclusory opinions unsupported by specific facts or data, and she provided no specific basis for any of the opinions offered.

The Department of Planning and Zoning on the other hand indicated that in addition to single family homes, churches and fire stations are permitted in the R2 District as a matter of right, and, assembly halls and daycare centers are permitted as special exception uses. Because the legislature has determined that adverse impacts from ball fields are acceptable in residential areas, and the Applicants failed to prove that they have been deprived of all reasonable uses of their property, as opposed to only the highest and best use, they failed to meet their burden of proving that the requested rezoning is required on the basis of a confiscatory taking.

Accordingly, as the Applicants failed to meet their proof in defining a reasonable neighborhood, or in establishing changes in the character of the neighborhood sufficient to justify piecemeal rezoning, and because even if the Board would have been justified in granting application on the ground of mistake, they were not required to rezone absent proof that the R2 zoning classification amounts to a confiscatory taking, it is recommended that the requested rezoning be denied.

Date NOVEMBER 30, 2006

REBECCA A BRYANT
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on DECEMBER 29, 2006.